Kesavan a/l Baskaran v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–145 OF 2006
GOPAL SRI RAM, HASAN LAH AND VINCENT NG JJCA
22 JULY 2008

Criminal Procedure — Sentencing — Mitigating factors — Whether sentence manifestly excessive — Factors taken into consideration

Criminal Procedure — Sentencing — Enhancement of sentence — Court's power under s 60(2) of the Court of Judicature Act 1964 — Whether sentence imposed grossly inadequate — Whether circumstances of case warranted enhancement of sentence — Whether court considered appellant's age and other mitigating factors

The appellant was initially charged for the offence of murder under s 302 of the Penal Code ('the Code'). However, at the commencement of the trial the prosecution tendered an alternative charge under s 304(a) of the Code to which the appellant pleaded guilty and was sentenced to a term of 14 years. It was the appellant's submission that the term of imprisonment imposed was manifestly excessive as the judge ought to have called for and considered the appellant's welfare report and should have also taken into account the appellant's age at the time of the commission of the offence. It was also submitted that the court should not enhance the sentence as the appellant had pleaded guilty and thus saved the court's time and expense and the court also had not exercised its powers under s 60(2) of the Courts of the Judicature Act 1964 ('the Act') as there was no appeal by the public prosecutor.

Held, dismissing the appeal:

(1) Age and a plea of guilt as mitigating factors must be weighed with the circumstances of each case. In the instant case the killing of the deceased was most gruesome and demanded severe punishment. In the circumstances, such mitigating factors may warrant little or no weight. Furthermore, the court has a duty to protect the public which may be raised as another factor against reducing the sentence in such cases (see paras 5–6).

(2) The courts have the power to enhance sentences under s 60(2) of the Act. This power may be exercised in appropriate cases and with a sense

of responsibility. In the instant case, although the public prosecutor had failed to appeal against the sentence, the court could still interfere to enhance the sentence, in the interest of justice. Having regard to the brutal way in which the crime was planned and executed, the court found that it had to invoke its power under s 60(2) of the Act to enhance the sentence to 18 years (see para 12).

[Bahasa Malaysia summary

Perayu pada mulanya telah dituduh kerana kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun'). Walau bagaimanapun, di permulaan perbicaraan pihak pendakwaan telah mengemukakan pertuduhan alternatif di bawah s 304(a) Kanun yang mana perayu telah mengaku bersalah dan telah dihukum penjara untuk tempoh 14 tahun. Adalah hujah perayu bahawa tempoh pemenjaraan yang dikenakan adalah keterlaluan kerana hakim patut memanggil dan mengambilkira laporan kebajikan perayu dan juga patut mempertimbangkan umur perayu pada masa kesalahan dilakukan. Ia juga dihujahkan bahawa mahkamah tidak patut menambah hukuman itu kerana perayu telah mengaku bersalah dan oleh itu telah menjimatkan masa dan perbelanjaan mahkamah dan mahkamah juga tidak menggunakan kuasanya di bawah s 60(2) Akta Mahkamah Kehakiman 1964 ('Akta') kerana tiada rayuan dikemukakan oleh pendakwa raya.

Diputuskan, menolak rayuan:

(1) Umur dan pengakuan bersalah sebagai faktor-faktor pengurangan hendaklah diimbangi dengan keadaan setiap kes. Dalam kes ini pembunuhan si mati amat menggerunkan dan menuntut hukuman yang berat. Dalam keadaan ini, faktor-faktor pengurangan sedemikian mungkin mempunyai sedikit atau tiada beban langsung. Bahkan, mahkamah mempunyai tanggungjawab untuk melindungi orang awam yang boleh dibangkitkan sebagai satu lagi faktor menentang pengurangan hukuman dalam kes-kes sebegini (lihat perenggan 5–6).

(2) Mahkamah mempunyai kuasa untuk menambah hukuman di bawah s 60(2) Akta. Kuasa ini boleh digunakan dalam kes-kes yang sesuai dan dengan rasa tanggungjawab. Dalam kes ini, meskipun pendakwa raya telah gagal merayu terhadap hukuman, mahkamah masih boleh campur tangan untuk menambah hukuman, demi kepentingan keadilan. Berdasarkan cara kejam kesalahan itu dirancang dan dilaksanakan, mahkamah mendapati bahawa ia perlu menggunakan kuasanya di bawah s 60(2) Akta untuk menambah hukuman kepada 18 tahun (lihat perenggan 12).]

Notes

For cases on enhancement of sentence, see *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4242–4243.

For cases on mitigating factors, see *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4263–4267.

Cases referred to

Fu Foo Tong v PP [1995] 1 SLR 448 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
R v Costen (1989) 11 Cr App R (S) 182 (refd)
Rex v Grondkowski [1946] 1 All ER 560 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(2)
Penal Code ss 302, 304(a)

Appeal from: Criminal Trial No 45–35 of 2003 (High Court, Ipoh)

Maria Stanislaus a/l S Vethanayagam (Sundarajan & Associates) for the appellant.
Devanandan a/l Subramaniam (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] The appellant was convicted of an offence under s 304(a) of the Penal Code and sentenced to a term of 14 years. Initially, he was charged with two other persons for the offence of murder under s 302 of the Penal Code. However, at the commencement of the trial the prosecution tendered an alternative charge under s 304(a) Penal Code to which the appellant pleaded guilty.

[3] Learned counsel for the appellant has submitted that the term of the imprisonment imposed on his client is manifestly excessive. The following points were canvassed in support of the appeal. First, that the High Court ought to have called for and considered the welfare report on the appellant. Second, that the judge ought to have taken into account the appellant's age at the time of the commission of the offence.

[4] In our judgment there is nothing in the first ground, because as pointed out by the learned deputy, the sentencing judge was very much alive to the

calling for a welfare report because he drew attention of counsel to it. However, the counsel for the appellant in the court below said that such a report was unnecessary. As for the second ground said to constitute a mitigating factor one must not fail to have regard to the circumstances in which the killing took place.

[5] There is no dispute that the appellant who was financially straitened planned to rob the deceased. It was he who enlisted the assistance of the other two accused to commit the crime. There is also no dispute that the deceased was savagely beaten then tied up and placed in a sack and thrown into a pond. In these circumstances we agree with the submission of the learned deputy that the killing of the deceased was most gruesome and demanded severe punishment. We are therefore, unpersuaded that the sentence is manifestly excessive in this case. But we are also of the view that given the circumstances alluded to the sentence was manifestly inadequate. We accordingly called upon counsel of the appellant to address us on why sentence should not be enhanced.

[6] Learned counsel put forward two reasons why this court ought not to interfere. In the first place the appellant had pleaded guilty and saved the court's time and expense to the public coffers. This, it was submitted was a considerable factor in mitigation. Secondly, it was submitted that the public prosecutor had found fit not to appeal in this case and this court therefore, not to exercise its powers under s 60(2) of the Courts of Judicature Act 1964. We will now address both these points.

[7] Generally speaking, a plea of guilt is a strong mitigating circumstance operating in favour of an accused. However, there may be cases where the offence committed is so serious and the circumstances in which it was committed so heinous that a plea of guilt need be given little or no weight. The need to protect the public is another factor that may prevail over a plea of guilt. In this context we find it sufficient to refer to the decision of the Criminal Division of the English Court of Appeal in *R v Costen* (1989) 11 Cr App R (S) 182 at p 184 where Lord Lane LCJ said:

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence, should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount.
>
> An example of that is the case of *Stabler* (1984) 6 Cr App R (S) 129, to which we have been referred by Mr Gibbs. The appellant there pleaded guilty to three counts of indecently assaulting females and one of assault occasioning actual bodily harm. The indecent assaults were all committed on the same day, on different victims.

The assault occasioning actual bodily harm was committed on the victim of one of the indecent assaults, and almost simultaneously with it. The appellant had 28 previous convictions for similar offences. There was evidence that he was suffering from an untreatable personality disorder and might cause serious injury or death. There was no basis for admission to a hospital.

What Mr Justice Macpherson said in delivering the judgment of the court was this:

> Society cannot provide any alternative for this man other than prison and since the court's powers are limited in respect of each individual offence, this court accepts that the judge was right to send him to prison for as long as he could within the court's powers subject to the reduction which we have mentioned in respect of counts three and five. If any alternative treatment becomes available while the appellant is in prison the authorities can of course act and do what they can to see that he is treated. But in our judgment these sentences, subject to making counts three and five concurrent, were correct.

He added that this man had no alternative but to plead guilty.

[8] In *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, Hashim Yeop A Sani J (later Chief Justice of Malaya) said this in relation to the principles that often guide a sentencing court:

> In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.
>
> The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

In a later passage His Lordship said:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* 35 Cr App R 164 as follows:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the

> hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

Presidents and magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v Grondkowski* [1946] 1 All ER 560, at p 561 offered some good advice when he said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

[9] Lastly, in *Fu Foo Tong v Public Prosecutor* [1995] 1 SLR 448, Karthigesu JA when delivering the judgment of the Singapore Court of Appeal expressed views with which we are entirely in agreement:

> It is not axiomatic that every plea of guilty 'entitles', as it was contended by counsel to a discount of between one-quarter to one-third of what might otherwise be considered an appropriate sentence after a trial. A plea of guilt can be of no mitigating value, for example, when the evidence overwhelmingly supports a conviction. As Chan Sek Keong J (as he then was) said in *Wong Kai Chuen Philip v PP* [1991] 1 MLJ 321 (cited with approval by this court in *Public Prosecutor v Lee Meow Sim Jenny* [1993] 3 SLR 885).
>
> ... the voluntary surrender by an offender and a plea of guilty by him in court are factors that can be taken into account in mitigation as they may be evidence of remorse and a willingness to accept punishment for his wrongdoing. However, I think that their relevance and the weight to be placed on them must depend on the circumstances of each case. I do not see any mitigation value in a robber surrendering to the police after he is surrounded and has no means of

escape, or much mitigation value in a professional man turning himself in the face of absolute knowledge that the game is up. A

[10] Having regard to the way which the crime was planned and executed in a most cruel and brutal fashion the appellant's plea of guilt in our judgment ought to be given no weight. In short, on the peculiar facts of this case it does not operate as a mitigating factor. B

[11] Next, there is the absence of the cross appeal by the public prosecutor. Now it is true; and it has been said often enough; that the public prosecutor is the guardian of the public interest. But so too are the courts. For they are the last bastion of the victimised and the oppressed. If the judiciary is to adopt a lenient tap on the wrist attitude as constituting sufficient punishment for a grave and serious crime merely because the public prosecutor has not filed a cross-appeal, the public will lose all faith in the justice system, particularly the courts. It is therefore of the utmost importance for a sentencing court to ensure that the sentence passed in cases involving a crime of a serious or brutal nature truly reflects the gravity of the offence. C D

[12] True it is that this court will sparingly and only in rare cases act under s 60(2) to enhance sentence. But the power exists for it to be exercised in appropriate cases and with a sense of responsibility. It would be easy enough for us to say in this case that since the public prosecutor has failed to appeal against sentence we too would wash our hands off the matter and deny justice to the victim's family and the public at large. But we cannot do that: for it would constitute an abdication of our constitutional duty. E F

[13] Having considered to all the circumstances operating in the appellant's favour in this case, we have come to the conclusion that this is one of those rare cases in which we must intervene under s 60(2). In our judgment the sentence of 14 years imposed by the High Court on the appellant is grossly inadequate having regard to the brutal way in which he committed the offence. In all the circumstances of the case we consider a term of 18 years imprisonment to be appropriate. In imposing that term we have considered the appellant's age and other mitigating factors operating in his favour. G H

Appeal dismissed.

Reported by Augustine Soosay I